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The Antitrust Activism of the European Commission in the Telecommunications Sector

This chapter analyses the role of the European Commission in taking cases of abuse of dominance in the telecommunications sector since its liberalisation in 1998. The argument is that the Commission has played a very active antitrust role, in particular at the beginning of the liberalisation, and that its activism was blessed by the EU Courts. Indeed, the Courts see competition law as a complement, and not a substitute, to regulation. They have set a relatively low threshold for proving margin squeeze, the most common form of abuse in telecommunications; and they have allowed wide discretion to the Commission to deal with the inaction or failures of national regulatory authorities (NRAs).

It is further submitted that such activism was justified in the early days of liberalisation when the telecommunications markets were still very concentrated, and when the NRAs were in their infancy and sometimes captured. However, this activism is less justified today because, on the one hand, competition in the sector has increased, and on the other hand most anticompetitive practices can be, and should be, addressed by the NRAs. Today, the Commission should instead concentrate on consolidating the expertise and the independence of the NRAs, and it should rely on its extensive oversight of NRA decisions to prevent violations of the competition law.

The chapter is divided into five sections. The first section reviews the main EU cases of abuse of dominance in the various telecoms segments. The next three sections deal with the main substantive and institutional issues raised by those cases. The second section describes the approaches of the Commission and the EU Courts on the relationship between competition law and sector-specific regulation. The third section analyses the tests established by EU Courts to control margin squeeze and refusal to deal in post-liberalised markets. It also compares them with the tests proposed by the Commission in its Guidance Paper on exclusionary abuses. The fourth section analyses the different uses made by the Commission of its antitrust powers in the telecoms sector, and their institutional implications. The fifth section concludes the chapter.

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1. Overview of the main EU cases of abuses of dominant position in telecommunications

This section reviews the main abuses of dominances cases taken at the EU level[1] according the four market segments: fixed voice, leased lines, mobile services and fixed internet broadband.[2]

1.1 Fixed voice telephony

In 1997, the Commission carried out a quasi-sector enquiry[3] in the fixed voice telephony segment and collected data from all the dominant operators in Europe with regard to tariffs for international phone calls in order to determine if the underlying wholesale charges paid between operators (ie, the accounting rates) were cost-oriented.[4] On that basis, in 1998 the Commission opened seven cases for excessive accounting rates. These cases were passed on to the NRAs, which secured substantial price reductions. These reductions amounted to an average of 27% in Finland, Austria and Portugal, for example.[5]

1.2 Leased lines

In 1999, the Commission opened a sector enquiry[6] in the leased lines segment, an important building block for the information highway since they were used by fixed new entrants and mobile telecom operators, Internet Service Providers and large business users.[7] The Commission presented its preliminary assessment

[1] For a review of the main EU cases, see Laurent Garzaniti and Matthew O'Regan, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation* (3rd edition, Sweet & Maxwell, 2010) Chapter V; ICN, Working Group on Telecommunications Services, Report to the Fifth Annual Conference in Cape Town (2006). Apart from those EU cases, a growing collection of national competition cases have been summarised in the European Competition Network Brief since 2010.

[2] Section 4 of this chapter shows that EU antitrust enforcement in telecommunications has followed a cycle of three phases that may be explained in part by the different uses the Commission has made of its antitrust powers.

[3] In 'quasi-sector enquiries', no formal sector enquiry is opened but questionnaires are sent to all operators of the market segment under review. See Dessislava Choumelova and Juan Delgado, 'Monitoring competition in the telecommunications sector: European Commission Sector Enquiries', in Pierre Buiges and Patrick Rey (eds), *The Economics of Antitrust and Regulation in Telecommunications* (Edward Elgar, 2004) pp 269 et seq.

[4] Press Release of the Commission IP/97/1180 of 19 December 1997.

[5] Press Release of the Commission IP/98/763 of 13 August 1998 (listing cases involving: OTE of Greece, Post & Telekom of Austria, Postes et Télécommunications of Luxembourg, Sonera of Finland, Telecom Eireann of Ireland, Telecom Italia, and Telecom Portugal); Press Release IP/99/279 of 29 April 1999.

[6] Sector enquiries are now based on Article 17 of Regulation 1/2003.

[7] Press Release IP/99/786 of 22 October 1999; Commission Working Document of 8 September 2000 on the initial results of the leased lines sector inquiry; Press Release IP/00/1043 of 22 September 2000; and Press Release IP/02/1852 of 11 December 2002.

in September 2000 and closed the enquiry in December 2002. In this context the Commission opened cases for excessive prices in short distance leased lines (in terms of prices and services provisioning) but again it passed these cases on to the NRAs. The Commission also opened five cases for excessive prices for international leased lines.[8] It could not rely on the NRAs for these cases, as international leased lines were not covered by sector-specific regulation. The cases were closed, however, once the undertakings concerned had significantly reduced their prices.[9]

1.3 Mobile

In 1998, the Commission carried out a quasi-sector enquiry in the mobile segment and collected systematic information on the high prices for fixed-to-mobile and mobile-to-fixed calls.[10] This led to several cases focusing on allegedly excessive fixed termination charges,[11] fixed retention charges,[12] and mobile termination charges.[13] The Commission was able to pass some of the cases to those NRAs that had jurisdiction to intervene under their national telecommunication laws; it dealt with the other cases itself, closing them when the operators agreed to reduce their charges from 30 to 80%.[14]

In January 2000, the Commission launched another sector enquiry concerning high international roaming prices.[15] In November 2000, the Commission presented its preliminary findings and identified several possible instances of excessive prices. On that basis, in 2004–2005 the Commission opened several cases for excessive wholesale international roaming prices.[16] However, it had to

[8] Against the incumbents of Belgium, Greece, Italy, Portugal and Spain.

[9] The average price decrease was 30% to 40% for the 2Mbits lines, the most commonly used bandwidth. See Press Release IP/02/1852 of 11 December 2002. At the time of the cases, there was no formal legal basis for the Commission to adopt commitment decisions.

[10] Press Release IP/98/1036 of 26 November 1998. In the case of mobile-to-fixed calls, the fixed termination charge is the fee paid by the mobile operator to the fixed operator for terminating the call. In case of fixed-to-mobile calls, the mobile termination charge is the fee paid by the fixed operator to the mobile operator for terminating the call, and the fixed retention charge is the fee kept by the fixed operator for originating the call.

[11] There were four cases involving Deutsche Telekom, KPN of the Netherlands, Telefónica of Spain, and Telecom Italia. See press Release IP/98/707 of 27 July 1998.

[12] Eight cases were launched and these involved Belgacom, Telecom Eireann of Ireland, Deutsche Telekom, KPN, Telefónica, Telecom Italia, British Telecom, and P&T of Austria. See Press Release IP/98/707 of 27 July 1998.

[13] Cases were opened in two countries and concerned all the mobile operators in Germany and in Italy. See Press Release IP/98/141 of 9 February 1998; Press Release IP/98/707 of 27 July 1998.

[14] Press Release IP/98/1036 of 26 November 1998; Press Release IP/99/298 of 4 May 1999.

[15] Press Release IP/00/111 of 4 February 2000; Commission Working Document of 13 December 2000 on the initial findings of the sector inquiry into mobile roaming charges; Commission MEMO/01/262 of 11 July 2001. International roaming tariffs are the charges that a mobile customer has to pay when giving and receiving calls abroad using a network other than the one to which he is affiliated.

[16] For the case against Vodafone and O2 in the UK, see Press Release IP/04/994. For the case against Vodafone and T-Mobile in Germany, see Press Release IP/05/161.

close the cases without securing any price reductions because, as became clear, competition law tools were inadequate to deal with the market failures arising from international roaming. To address the problem, in 2007 the EU legislature adopted a widely publicised Regulation setting maximum prices for wholesale and retail international roaming prices.[17]

1.4 Fixed internet broadband

Since the turn of the century, most of the abuse cases have related to the development of fixed internet broadband because broadband deployment is the key driver for ITC development.[18] In 2000, the Commission adopted guidelines on the application of antitrust rules to restricted access to the local loop (ie, the last mile of the network, where the economies of scale and scope are the largest).[19] It also opened a sector enquiry dealing with similar issues.[20] On that basis, the Commission opened several individual cases and adopted four formal decisions.[21] In addition to these antitrust actions, the EU legislature in 2000 adopted a specific regulation forcing the unbundling of the local loop, which proved to be effective mechanism in several Member States for increasing competition in the provision of broadband.[22]

Wanadoo (2003)

In *Wanadoo*,[23] the Commission imposed a fine of 10.35 million euros against Wanadoo, the Internet Service Provider belonging to Orange/France Télécom group, on the ground that its retail prices for ADSL were predatory. The Commission found first that the firm's prices were below average variable cost between 1999 and August 2001; and second that its prices were below average total cost and part of an exclusionary plan between September 2001 and October 2002. During that time, Wanadoo's market share rose from 46% to 72% on a

[17] The recast version is Regulation 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks, 2012 OJ L172/10.

[18] More recently, see Communication of 26 August 2010, A Digital Agenda for Europe, COM(2010) 245, which also promoted high broadband connections, in particular to stimulate growth in Europe.

[19] Communication of 26 April 2000 on unbundled access to the local loop, 2000 OJ C272/55.

[20] Press Release IP/00/765 of 12 July 2000.

[21] The vast majority of these cases related to margin squeeze for fixed broadband Internet. See Cento Vejanovski, 'Margin squeeze: An overview of EU and national case law', *e-Competitions* n° 46, 2012; Damien Geradin and Robert O'Donoghue, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector', 1 *Journal of Competition Law and Economics* 355 (2005).

[22] Regulation 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, 2000 OJ L336/4. This Regulation has been repealed and carried over in Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and services, 2002 OJ L108/7, as amended by Directive 2009/140.

[23] Commission Decision of 16 July 2003 in Case COMP/38.233 – *Wanadoo Interactive*.

market which experienced more than a five-fold increase in size. The abuse came to an end with a 30% decrease of wholesale charges, after which the French high-speed internet access market grew more rapidly, and in a more balanced way. The Commission's infringement decision was upheld by the General Court in 2007,[24] and then by the Court of Justice in 2009.[25]

Deutsche Telekom (2003)

In that case,[26] the Commission imposed a fine of 12.6 million euros against Deutsche Telekom, the German incumbent, for maintaining a margin squeeze between its wholesale charge for full unbundling of the local loop and its retail prices for access lines. The Commission compared the wholesale access prices that Deutsche Telekom charged its competitors for use its local loops with the retail prices the company charged end-users for its different retail offerings (analogue, ISDN and ADSL connections).[27] This comparison revealed that the margin between the wholesale and retail prices was negative for the period 1998 through 2001. Although the margin then became positive it was still insufficient to cover DT's own retail product-specific costs for the supply of end-user services.

The Commission's condemnation of DT was particularly contentious because the company's wholesale and retail charges had been subject to the control of the German regulator. The decision to sanction DT was thus an indirect critique of the NRA's work. However, as the retail tariffs were regulated with a price cap applying to a basket of services, DT still had some price discretion and it could have alleviated or at least diminished the squeeze. In 2008, the General Court upheld the Commission's decision,[28] and in 2010 the Court of Justice agreed.[29]

In 2004, the Commission found that DT had maintained another margin squeeze between the wholesale charges for shared access of the local loop and retail access lines. This time, DT settled the case by committing to petition the German NRA for a reduction of the line sharing tariffs on a lasting basis.[30] In order to comply with these commitments, and following approval by the NRA for one year, DT decreased its monthly line sharing fee (from €4.77 to €2.43). Subsequently, several competitors rolled out their networks in order to provide broadband services. However, in May 2005 DT re-applied to the NRA for a shared access charge at €4.77. The Commission against found that the fee would lead to a margin squeeze. It therefore requested that DT file an application consistent with its commitments, and the company complied.[31]

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[24] Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107.

[25] Case C-202/07 P *France Télécom SA v Commission* [2009] ECR I-2369.

[26] Commission Decision of 21 May 2003 in Case 37.451 – *Deutsche Telekom*, 2003 OJ L263/9.

[27] In order to achieve a coherent comparison, the Commission used a weighted approach taking into account the numbers of DT's customers for the different retail offerings.

[28] Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477.

[29] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-9555.

[30] Press Release of the Commission IP/04/281 of 1 March 2004.

[31] Press Release of the Commission IP/05/1033 of 3 August 2005.

Telefónica (2007)

In that case,[32] the Commission imposed a fine of 152 million euros against Telefónica, the Spanish incumbent, for a price squeeze between Telefónica's national and regional wholesale charges for access to its broadband network and Telefónica's retail prices for broadband access. The margins were insufficient to cover Telefónica retail costs between September 2001 and December 2006. Because of a lack of competition, the internet broadband prices were higher in Spain than in the other EU Member States. Wholesale regional tariffs were regulated but were based on Telefónica's forecasts, which proved to be wrong, and wholesale national tariffs were unregulated. The abuse ended with a decrease in Telefónica's wholesale charges. The Commission's decision was upheld by the General Court in 2012,[33] and then by the Court of Justice in 2014.[34]

TeliaSonera (2011)

In this case,[35] the Swedish competition authority condemned TeliaSonera, the Swedish incumbent, for a margin squeeze between wholesale and retail charges for ADSL products maintained between April 2000 and January 2003. Some of the wholesale charges were unregulated. When the case reached the Swedish court, the judge referred ten specific questions regarding margin squeeze to the Court of Justice. In its reply, which is analysed below in section 2, the Court established a relatively low threshold for finding an unlawful price squeeze. On that basis, the Swedish Court condemned TeliaSonera and imposed a fine of 4 million euros.

Telekomunikacja Polska (2011)

In this case,[36] the Commission imposed a fine of 127 million euros against Telekomunikacja Polska, the Polish incumbent which is part of the Orange/France Télécom group, for refusing to supply wholesale broadband products to competitors between August 2005 and October 2009. In particular, the Commission found that Telekomunikacja Polska was: (i) proposing to entrants unreasonable conditions for access to its wholesale broadband products; (ii) delaying the negotiation process, as 70% of the time Telekomunikacja Polska had failed to meet a 90-day regulatory deadline for concluding negotiations; (iii) limiting access to its network by, *inter alia,* rejecting entrants' orders on unreasonable grounds or proposing difficult technical conditions for connecting to the company's network; (iv) limiting access

[32] Commission Decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España v Telefónica*, 2008 OJ C83/6.

[33] Case T-336/07 *Telefónica, SA and Telefónica de España, SA v Commission (Telefónica I)* [2012] ECR II-000; Case T-398/07 *Spain v Commission (Telefónica II)* [2012] ECR II-527.

[34] Case C-295/12 P *Telefónica and Telefónica de España v Commission* [2014] ECR I-000.

[35] Case C-52/09 *Konkurrensverket v TeliaSonera AB* [2011] ECR I-527.

[36] Commission Decision of 22 June 2011 in Case COMP/39.325 – *Telekomunikacja Polska*.

to subscriber lines by, *inter alia,* rejecting entrants' orders to activate subscriber lines on unreasonable grounds or limiting the availability of subscriber lines; and (v) refusing to provide reliable general information indispensable for entrants, or providing inaccurate information. The abuse ended with an agreement between Telekomunikacja Polska and the Polish regulator to improve entrants' access to the network. As of this writing, the Commission's infringement decision is under appeal before the General Court.[37]

Statement of Objections issued to Slovak Telekom

In *Slovak Telekom*,[38] the Commission sent a Statement of Objections to Slovak Telekom, the Slovak incumbent – a part of the Deutsche Telekom group – for refusing to supply unbundled access to its local loop and wholesale services to a competitor; and for imposing a price squeeze on alternative operators. This case is currently still pending at the Commission.

Having reviewed the main EU abuse of dominance cases in the telecoms sector, I now turn to the substantive and institutional issues raised by those cases. Specifically, these are: the relationship between competition law and sectoral regulation; the relevant tests to establish the most common form of abuse in telecoms; and the role of the Commission in supporting liberalisation and in controlling the NRAs.

2. The (complementary) relationship between competition law and sectoral regulation

2.1. Competition law supplements sectoral regulation

The Court of Justice has consistently held that competition law applies to regulated industries unless there is a specific exemption in the law. As there is no legal exemption for telecommunications, competition law applies to the sector in its entirety.[39] Moreover, competition law applies in addition to regulation unless the regulation completely removes the autonomy of the undertaking concerned. In *Deutsche Telekom*, the Court of Justice held that:

> It is only if anticompetitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles [101 and 102 TFEU] do not apply. In such a situation,

[37] Case T-486/11 *Orange Polska v Commission*, not yet decided.
[38] Press Release IP/10/1741 of 17 December 2010; Press Release IP/12/462 of 8 May 2012.
[39] Case 41/83 *Italy v Commission* [1984] ECR 873.

> the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. [101 and 102 TFEU] may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings.
> The possibility of excluding anticompetitive conduct from the scope of Articles [101 and 102 TFEU] on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice.[40]

Clearly, the Court sees competition law as a complement – and not a substitute – to regulation. As the Court of Justice put it in *Deutsche Telekom*:

> The competition rules laid down by the [TFEU] supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets.[41]

Another more obvious point on the relationship between regulation and competition policy is that, when a competition authority investigates whether an abuse of dominance has taken place, it should account of the regulation in place. According to the General Court:

> Since the legislation relating to the telecommunications sector defines the legal framework applicable to it and, in so doing, contributes to the determination of the competitive conditions under which an undertaking […] carries on its business in the relevant markets, it is […] a relevant factor in the application of Article [102 TFEU] to the conduct of that undertaking, whether for the purposes of defining the relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines.[42]

The position of the EU Courts on the relationship between competition law and regulation is famously different from that of the U.S. Supreme Court. In *Trinko,*[43] a

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[40] *Deutsche Telekom*, cited above note 29, paras 80–81. This is well-established case law both in the telecoms sector (*TeliaSonera*, cited above note 35, paras 49–50; *Telefónica I*, cited above note 33, paras 328–329; *Telefónica II,* cited above note 33, paras 70–71) and in other regulated markets (Case C-359/95 P *Commission and France v Ladbroke Racing Ltd* [1995] ECR I-6265, para 33). On the regulated conduct defence in the EU, see, eg, Richard Wainwright and Andre Bouquet, 'State Intervention and Action in EC Competition Law', in Barry Hawk (ed), *International Law & Policy: Fordham Corporate Law Institute 2003* (Juris Publishing, 2004); OECD, Regulated Conduct Defence (2011), DAF/COMP(2011)3. Where this defence is invoked, the regulation must of course comply with EU law. If not, it should be repealed and, in any case, to the extent that it conflicts with EU law it cannot be applied by national courts or authorities. See, eg, Case 267/86 *Pascal Van Eycke v ASPA* [1988] ECR 4769, para 16; Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [1989] ECR 838, para 48.

[41] *Deutsche Telekom*, cited above note 29, para 92. See also *Telefónica I*, cited above note 33, para 293*; Telefónica II,* cited above note 33, para 56.

[42] *Deutsche Telekom*, cited above note 29, para 224; *Telefónica II,* cited above note 33, para 55. For instance, in *Deutsche Telekom*, the Commission took into account the objective of tariff rebalancing between access and services prices; in *Telefónica*, the Commission took into account the incentives associated with the investment ladder.

[43] *Verizon Communications Inc v Law Offices of Curtis V Trinko*, 540 U.S. 682 (2004). According to the Antitrust Modernization Commission's Report and Recommendations (2007), at 362, '*Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act. It should

well-known case brought under Section 2 of the Sherman Act, the Supreme Court refused to condemn a telecoms incumbent, Verizon, for refusing to give access to its network to its competitor AT&T, since the incumbent had already been condemned by the federal and the State telecom regulators. The Supreme Court held that the regulatory duty to deal established under the 1996 U.S. Telecommunications Act did not create a new cause of action under the refusal to deal doctrine under Section 2. It is clear from the judgment that the Supreme Court regarded regulation more as a substitute than as a complement to antitrust law.

2.2. The rationale for and the risks of the parallel application of competition law and sector regulation

As the General Court has clarified,[44] the difference between the EU and the U.S. positions is explained by different institutional settings: EU competition law has a 'constitutional' value (in particular since it is enshrined in the TFEU) whose application cannot be precluded by national sector-specific regulation. By contrast, notwithstanding the importance of free enterprise in American society and law, the Sherman Act in the end has the same legal value as other federal statutes.

As competition law applies in addition to regulation, it could be argued that the cumulative application of two legal instruments to the same behaviour may violate some legal principles such as legitimate expectations or *ne bis in idem*. With regard to the principle of legitimate expectations, the EU Courts consider that a decision adopted by a National Regulatory Authority cannot create, for a dominant operator, expectations that its behaviour complies with competition law and would not be condemned by a competition authority.[45] This is because the NRA usually takes decisions on the basis of sectoral regulation, which has different objectives than competition policy.[46] That has also been clarified in several sets

not be read to displace the role of the antitrust laws in regulated industries as an implied immunity, nor should it be taken as a judicial rejection of a savings clause.' See also *Credit Suisse Securities (USA) v Billing,* 551 U.S. 264 (2007).

[44] *Telefónica II*, cited above note 33, para 55. This was also the view of Alexander Italianer, 'Level-playing field and innovation in technology markets', speech, Palo Alto, 28 January 2013, at 6, and of Pierre Larouche, 'Contrasting Legal Solutions and Comparability of the E.U. and U.S. Experiences', TILEC Discussion Paper 28 (2006), at 11.

[45] *Telefónica I*, cited above note 33, para 299; *Telefónica II*, cited above note 33, para 122.

[46] According to Article 8 of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), 2002 OJ L108/33, as amended by Directive 2009/140, sector regulation should promote competition, contribute to the development of the digital internal market, and promote the interests of the European citizens. In practice, sectoral regulation aims to increase competition on the market, possibly with entry support, while EU competition policy aims to preserve the competitive structure of markets. As noted by the European Regulators Group (ie, the club of the NRAs of the EU, now BEREC) in the context of margin squeeze, 'While competition law is intended to prevent margin squeeze as an exclusionary abuse, ex ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets.' ERG Report of March 2009 on the discussion of the application of Margin Squeeze tests to bundles, ERG (09) 07, para 6.

of guidelines issued by the Commission.[47] But beyond the 'different objectives' rationale, even if an NRA adopted its decision on the basis of competition policy, the Commission would not be bound by such national decision.[48]

With regard to the principle of *ne bis in idem*, the Court of Justice decided that three conditions need to be met for the principle to be violated: identity of facts, unity of offender and unity of the legal interest protected.[49] According to the Commission, an antitrust decision which complements a regulatory decision does not violate the principle of *ne bis in idem* because the two decisions do not protect the same legal interest: regulation and competition law pursue, it is said, different objectives.[50]

The only possible defence in a competition case for a dominant operator which is regulated (in cases where it still acts with some autonomy despite the presence of regulation) is to request a reduction of the fine that would otherwise apply on the ground that the constraints imposed on it by the relevant regulation is a mitigating circumstance.[51]

Thus, the conception of the EU Courts with regard to the complementary relationship between regulation and competition law extends quite far the 'special responsibility' of the dominant undertaking, which in a sense becomes a guardian of the Treaty. Indeed, a dominant telecoms operator which is regulated has to go to the regulator to request changes to its tariffs in accordance with that regulation in order to avoid the finding of abuse.[52]

3. The legal tests for abuses in post-liberalised markets

The next substantive issue raised by the cases reviewed above concerns the legal tests established by the Commission and by the EU Courts to address the most common forms of abuse of dominance in the telecoms sector, namely margin squeeze and refusal to deal. My claim in this regard is that the price squeeze test adopted by the Courts is relatively interventionist, and that the low threshold for

[47] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, 1998 OJ C265/2 ('Access Notice'), para 22; Commission Guidelines of 9 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002 OJ C165/6, para 31. See also Framework Directive 2002/21 as amended, Article 15(1).

[48] See the CFI's judgment in *Deutsche Telekom*, cited above note 28, para 120 (citing Case C344/98 *Masterfoods and HB* [2000] ECR I-11369, para 48). See also *Telefónica I*, cited above note 33, para 301.

[49] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, para 338.

[50] Commission Decision in *Telekomunikacja Polska*, cited above note 36, para 139.

[51] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2a) of Regulation 1/2003, 2006 OJ C210/5, para 29; *Deutsche Telekom*, cited above note 29, paras 279 and 286; *Telefónica I*, cited above note 33, paras 453–463.

[52] CFI in *Deutsche Telekom*, cited above note 28, para 122; *Telefónica I*, cited above note 33, para 335.

a finding of abuse may be partly due to the fact that this type of abuse emerged in post-liberalised industries. I also submit that the position of the Courts and the position of the Commission are not exactly the same. The Courts apply different legal tests for price squeeze and refusal to deal, but they do not make a clear distinction between standard non-regulated markets and post-liberalised regulated markets. On the contrary, the Commission suggests similar legal tests for margin squeeze and refusal to deal, but it differentiates between non-regulated and regulated markets.

3.1. Margin squeeze

From a European perspective, a price squeeze or margin squeeze arises when the margin between a (vertically integrated) dominant firm's wholesale price and its retail price is negative or, alternatively, where it is positive but insufficient to cover the firm's retail costs, thereby leading to the possible exclusion of equally efficient competitors. To remedy this practice, the dominant firm is expected to decrease its wholesale prices and/or increase its retail prices.[53] The Court of Justice has held that a margin squeeze is abusive in itself, ie that it is an independent form of abuse.[54] Consequently, in order to condemn a margin squeeze, the competition authority need not prove that the conditions for another type of abuse are satisfied. For example, it is unnecessary to show that the wholesale price is excessive, or that the retail price is predatory.[55]

Furthermore, the competition authority need not to prove that the conditions for an illegal refusal to deal are satisfied. That is to say, in a margin squeeze case the wholesale product or service does not have to meet the strict *Bronner* conditions, such as in particular the criterion of indispensability.[56] According to the Court of Justice, treating margin squeeze as a form of refusal to deal would unduly reduce the effectiveness of Article 102 TFEU; it was unwilling to accept the analogy with refusal to supply.[57] On the other hand, the competition authority does have to prove that the margin squeeze has potential or concrete anticompetitive effects.[58] Proving such effects is facilitated where the wholesale product is essential for activities downstream,[59] but it cannot be excluded that a margin squeeze can have anticompetitive effects even if that product is not essential.[60] In short, it is not necessary to show that the wholesale product is an

[53] *Deutsche Telekom*, cited above note 29, para 181.

[54] Ibid, para 183; *TeliaSonera*, cited above note 35, paras 31 and 56.

[55] *Deutsche Telekom*, cited above note 29, para 183; *TeliaSonera*, cited above note 35, para 34; *Telefónica I*, cited above note 33, para 187.

[56] *TeliaSonera*, cited above note 35, para 55; *Telefónica I*, cited above note 33, para 180; *Telefónica II,* cited above note 333, para 74.

[57] *TeliaSonera*, cited above note 35, para 58.

[58] Ibid, para 64; *Deutsche Telekom*, cited above note 29, para 252.

[59] *Deutsche Telekom*, cited above note 29, para 255; *TeliaSonera*, cited above note 35, para 71; *Telefónica I*, cited above note 33, para 182; *Telefónica II,* cited above note 33, para 94.

[60] *TeliaSonera*, cited above note 35, para 72.

'essential facility',[61] but if it is demonstrated that the product is indeed essential, this goes a long way toward establishing that the compressed margin is producing or is likely to produce anticompetitive effects.

One difficult issue when the margin between the wholesale and the retail price is positive is to determine which costs – those of the dominant undertaking or the competitors – should be used to evaluate whether the margin is nevertheless unlawfully narrow. According to the EU Courts, the competition authority should *in principle* use the retail costs of the dominant undertaking for reasons of efficiency and legal certainty.[62] Using the retail costs of the dominant undertaking ensures that a margin squeeze will be prohibited only when a competitor as efficient as the dominant firm – ie, has the same or a lower retail costs than the dominant operator – cannot enter or would be expelled from the market. Moreover, the dominant operator normally only knows (or should only know) its own retail costs and not those of its competitors. It can therefore only assess the legality of its practices on the basis of its own costs. However, the EU Courts have accepted that, in specific circumstances, the competition authority may rely on the retail costs of the dominant firm's competitors. According to the Court of Justice, that may be the case in three circumstances:

- where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons;
- where the service supplied to competitors consists in the mere use of infrastructure whose production cost has already been written off, so that access to that infrastructure no longer represents a cost for the dominant undertaking that is economically comparable to the cost its competitors have to incur in order to have access to it; or
- where so dictated by the particular competitive conditions – for example, by reason of the fact that the level of the incumbent's costs is specifically attributable to the competitively advantageous situation it enjoys as a result of its own dominant position.[63]

The Court of Justice does not impose other limiting factors on the concept of margin squeeze which have sometimes been proposed in the literature, and which were raised by the Swedish court in the *TeliaSonera* case. In particular, the Court held that: (i) the competition authority does not have to prove that the defendant

[61] *Telefónica II,* cited above 33, para 76.

[62] *Deutsche Telekom*, cited above 29, paras 198 and 202; *TeliaSonera*, cited above note 35, paras 41–44.

[63] *TeliaSonera*, cited above note 35, paraphrasing para 45. In the Access Notice (cited above note 47, para 118), the Commission had also envisaged that, in appropriate circumstances which were not defined, the costs of a reasonably efficient operator should be used for the margin squeeze test unless the dominant company could show that its downstream operation was exceptionally efficient. In its Guidance Paper on exclusionary abuses, the Commission envisages using the costs of competitors when reliable information on the costs of the dominant undertaking is unavailable or when it is not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 OJ C45/7, paras 25 and 80.

enjoys superdominance or a quasi-monopoly on the wholesale market, although it accepts that the degree of dominance may have an impact on the effects of the contested conduct;[64] (ii) the competition authority does not have to prove that the defendant enjoys a *double* dominance on the wholesale market and the retail market, as the dominant position on the wholesale market suffices to be able to produce anticompetitive effects on the retail market;[65] (iii) there is no need to prove that the defendant will later be able to recoup losses created by the margin squeeze, as the possibility that competitors may be driven from the market depends neither on defendant suffering losses nor on its ability to recoup losses but solely on the margin between the prices applied by the defendant on the markets concerned;[66] (iv) the margin squeeze may be illegal when it applies to existing customers but also to new customers;[67] and (v) the margin squeeze may be illegal when it applies to mature technologies and markets but also when it applies to new and emerging technologies and markets.[68]

Thus, the EU Courts have adopted a rather loose legal test to determine whether a dominant undertaking has unlawfully 'squeezed' the margin between its wholesale and retail prices. To condemn the undertaking for such an abuse, a competition authority (or a plaintiff) merely has to prove that: (i) the margin between wholesale prices and retail prices is either negative or, if positive, insufficient to cover the undertaking's own retail costs (or in the specific circumstances described above, the costs of a competitor); and (ii) that narrow margin produces actual or potential anticompetitive effects. The authority (plaintiff) does not have to prove the stricter conditions of excessive prices, predatory prices, or refusal to deal. Moreover, 'double dominance', superdominance and the possibility of recoupment are all unnecessary for the purpose of establishing liability; they may only facilitate proving the two necessary conditions described above. Remarkably, this lax legal test, which was initially developed for regulated products and services, applies equally to non-regulated products and services, as the Court of Justice does not differentiate between these circumstances.[69]

The European approach is in sharp contrast with the strict legal test adopted by the US Supreme Court in *Linkline*.[70] In that case, the Supreme Court decided that margin squeeze cannot in itself be prohibited independently of whether there is a duty to deal at the wholesale level or predatory pricing at the retail level. The European approach is also in contrast with mainstream economics, according

[64] *TeliaSonera*, cited above note 35, para 81.
[65] Ibid, para 89; *Telefónica I*, cited above note 33, para 146.
[66] *TeliaSonera*, cited above note 35, para 101.
[67] Ibid, para 92.
[68] Ibid, para 108, stating that: 'particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market, in other words it requires action before the anti-competitive effects of that strategy are realised.' In *France Télécom* (cited above note 24, para 107), the General Court had already considered that Article 102 applied to high growth markets.
[69] *TeliaSonera*, cited above note 35, para 52.
[70] *Pacific Bell Telephone Co v LinkLine*, 555 U.S. 438 (2009).

to which margin squeeze should be not an independent abuse.[71] Furthermore, the Court's position is different from that suggested by the Commission. In its Guidance Paper, the Commission applies the same legal test for margin squeeze and for refusal to deal[72] but it relaxes the test in cases of regulated products and services, or where the product or service has been developed under the protection of legal monopoly or with state resources.[73] The EU Courts – and needless to say, it is the Court of Justice that decides on the authoritative interpretation of Article 102 – follow a very different route. They consider that the legal test for margin squeeze is different – and looser – than for refusal to deal. And, as already mentioned, they do not differentiate as to how the test should be applied in regulated and non-regulated industries.[74]

3.2. Refusal to deal

With regard to refusal to deal, the Commission in its Guidance Paper makes a distinction in the way it applies the legal test according to whether the refusal concerns non-regulated markets or regulated/post-liberalisation markets. According to this distinction, the Commission applies a looser test in the latter context.[75] The rationale for this differentiated treatment is that the effects of the antitrust intervention on investment incentives are already taken into account by the regulator when an antitrust decision complements a regulatory decision, or that the impact on incentives is less relevant when the infrastructure concerned has been developed under conditions sheltered from normal market forces.

It is not clear whether the EU Courts will embrace the above distinction advocated by the Commission in the Guidance Paper. Advocate General Jacobs alluded to such a distinction in the *Bronner* case.[76] However, in *TeliaSonera* (discussed above), the Court of Justice refused to accept the possibility of differentiated treatment in the context of a margin squeeze case.[77]

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[71] William Baumol et al, Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners, *Pacific Bell Telephone Co v linkLine Communications*, 2007; Geert Brunekreeft et al, 'On the law and economics of price squeeze in telecommunications markets', TILEC Report (2005); J Gregory Sidak, "Abolishing the Price Squeeze as a Theory of Antitrust Liability', 4 *Journal of Competition Law and Economics* 279 (2008).

[72] See Guidance Paper, cited above note 63, at para 80.

[73] See ibid, para 82 (an application of the 'original sin' theory).

[74] Moreover, in *TeliaSonera* (cited above note 35, para 92), the Court of Justice declined to follow the distinction between an abuse against existing customers and an abuse against new customers, which the Commission had introduced in the Guidance Paper at para 84.

[75] Guidance Paper, cited above note 63, para 82.

[76] Opinion of Advocate General Jacobs in Case C-7/97 *Oscar Bronner GmbH v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH* [1998] ECR I-7791, para 66.

[77] Geradin argues that such differentiation is not justified legally and economically. See Damien Geradin, 'Refusal to Supply and Margin Squeeze: A Discussion of Why the 'Telefonica Exceptions' are Wrong', TILEC Discussion Paper 51 (2011).

3.3. The rationale and the risk of a loose legal test for abuse of dominant position

The loose legal test adopted by the EU Courts for margin squeeze may be explained by the fact that this type of abuse mainly takes place in the telecommunications sector, ie in a previously monopolised network industries. In this sector, the Courts may be less concerned with the possibility of a type I error (over-enforcement) and the effects of such an error on investment (dis) incentives.[78] A complementary, and more speculative, explanation for the loose test is that the Courts have taken into account the effects of their decisions on sector regulation. Since 2003, the economic telecommunications regulation has been based on competition law methodologies,[79] and NRAs are currently dealing with numerous price squeeze cases under sectoral regulation. The EU Courts may have feared that if they had adopted a stricter test for price squeeze under competition law, the stricter text would have 'spilled over' into the application of regulatory obligations, thereby substantially and inappropriately limiting the possibilities of intervention by regulators.

Whatever the explanation may be, I submit that the loose legal test of the EU Courts for margin squeeze is inappropriate because it unduly increases the risk of type I errors.[80] To make things worse, the costs of type I errors may be substantial in fast-moving industries such as telecommunications.[81] In addition, antitrust remedies in the case of a price squeeze are difficult to design. As the U.S. Supreme Court observed in *Linkline*:[82]

> Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. Courts would be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze. Moreover, firms seeking to avoid price-squeeze liability will have no safe harbor for their pricing practices.

Worse still, the loose test is even more problematic when it is applied in sectors of the economy which, unlike telecoms, did not develop under the protection of monopoly rights or which are not extensively regulated. In those circumstances, the costs of type I errors may be even more significant.

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[78] This follows the same reasoning of the Commission Guidance Paper, which relaxes the legal test for markets which are regulated or did not develop under normal commercial conditions.

[79] Framework Directive 2002/21 as amended, Articles 14–16.

[80] Past practice in the US electricity sector shows that the risk of type I errors is already important in the network industries. See Paul Joskow, 'Mixing Regulatory and Antitrust Policies in the Electricity Power Industry: The Price Squeeze and Retail Market Competition', in Franklin Fisher, ed., *Antitrust and Regulation: Essays in Memory of John McGowan*, MIT Press, 1985, at 174, observing that 'the great quantity of litigation motivated by concern about price squeezes in particular, and retail market competition in general, has had no positive efficiency consequences; it is at best a waste of time and litigation expense and at worst a source of inefficiency'.

[81] Jerry Hausman, 'Valuing the Effect of Regulation on New Services in Telecommunications', Brookings Papers: Microeconomics, 1997.

[82] See above.

To alleviate some of those difficulties, I suggest that margin squeeze should rely exclusively on the costs of the dominant firms and not the costs of the competitors. Otherwise, there is a risk of supporting competitors instead of competition.[83] I suggest further that the degree of dominance on the wholesale level should play a more prominent role in proving the abuse, and that the competition authorities should be particularly cautious when intervening in emerging markets.

As to the differentiation of the test for refusal to deal, it is intuitive economics that the costs of type I errors and the negative effects on investment incentive may be of less concern in sectors which are regulated or which have developed outside normal market conditions. However, that intuitively appealing approach has several weaknesses and may result in the contamination of orthodox economically oriented competition policy with sectoral characteristics or regulatory objectives.

4. The proliferating roles of the Commission in post-liberalised markets

The last issue to be addressed here is institutional in nature. It emerges from the telecoms cases analysed above and is linked to the evolution of the cycle of EU antitrust enforcement in the telecommunications, which may be explained in part by the different uses that the Commission has made of its antitrust powers.

4.1. The cycle of EU antitrust enforcement and the different uses of antitrust power

Antitrust enforcement by the Commission in the telecoms sector followed several phases. The first phase can be traced to 1998, a key year which marked the beginning of full liberalisation. At that stage, the Commission was very active. It adopted general guidelines,[84] which were not based on a stock of previous cases,[85] on the application of competition law to key access issues. It also carried out, as noted above, several sector enquiries or quasi-sector enquiries. And it opened many individual cases for exploitative and exclusionary abuses. None of those

[83] This is also the view of the ERG, which has explained that 'a competition authority, in assessing whether or not a dominant position has been abused, would tend to base its calculations on the costs actually incurred by the dominant undertaking. In particular, this would allow the dominant player to take credit for economies of scope or scale and consequently to be able to operate a profitable downstream service on thinner margins than would be possible for an entrant.' Revised ERG Common Position of 2006 on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06) 33, at p 120.

[84] Access Notice, cited above note 47. Prior to the Access Notice, see also Commission Guidelines on the application of EEC Competition rules in the Telecommunications sector, 1991 OJ C233/2.

[85] Ibid, para 6.

cases led to a formal infringement decision, as all the cases were either transferred to NRAs, when they had the competence and the willingness to act, or settled by the Commission.

The second phase took place after liberalisation, when oversight of the NRAs by the Commission was still weak. At that stage, the Commission adopted several decisions in cases involving exclusionary abuses, essentially forcing the NRAs to act to accommodate the Commission's preferences. Thus, the *Wanadoo* case ended with a decrease of wholesale access prices imposed by the French regulator; the *Deutsche Telekom* case ended with a wholesale price decrease imposed by the German regulator; and *Telekomunikacja Polska* ended with an agreement between the incumbent and the Polish regulator on efficient access to the local loop. With those cases, the Commission used competition law to complement or correct national regulatory decisions which in the Commission's view were inappropriate. In some of those circumstances, the Commission could also have opened infringement procedures under Article 258 TFEU against the Member States of the failing regulators. According to the EU Courts, the choice between bringing an antitrust case and an infringement procedure under Article 258 is left to the broad discretion of the Commission.[86] This allows for more flexibility and efficiency, since Article 258 actions can be slower and more politicised. However, as we have seen, resolving the problem via an antitrust procedure can substantially extend the special responsibility of the dominant operator.

If the Commission opts for an antitrust action, the next question is whether it should cooperate with the NRA. On that issue too, the EU Courts accord discretion to the Commission, holding that the 'sincere cooperation' clause of the TEU (i.e, Article 4(3)) does not require the Commission to cooperate with or consult the NRAs during an antitrust investigation.[87] This flexibility can be useful, especially if the NRAs is liable to take inappropriate action and/or delay the investigation. On the other hand, since NRAs have expert knowledge of the sector, it is generally better for the Commission to cooperate with them during its investigations and when it designs remedies. This is in fact what usually happens in practice.[88]

At present we are in a third phase of the enforcement cycle. In this phase, the Commission opens fewer abuse of dominance cases in the telecoms sector. Meanwhile, more cases are being pursued by national competition authorities.

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[86] *Telefónica I*, cited above note 33, para 307; *Telefónica II,* cited above note 33, para 115.

[87] *Telefónica I*, cited above note 33, para 312; *Telefónica II,* cited above note 33, para 47, stating that 'the rules for the operation of the duty of sincere cooperation which stems from Article [4(3) TEU] and which binds the Commission in its relationships with the Member States have been stated in, inter alia, Articles 11 to 16 of Regulation 1/2003, in Chapter IV headed "Cooperation". Those provisions do not impose an obligation on the Commission to consult the NRA, nor do they provide for the Commission being able […] to undertake "joint action" with them in proceedings conducted by the Commission pursuant to Articles [101 and 102 TFEU].'

[88] At the national level, many competition and regulatory authorities have concludes cooperation agreements. See OECD, Regulated Conduct Defence, cited above note 40, at 46–48.

4.3. The rationale for and the risk of the Commission's proliferating roles

The evolution of the cycle of EU enforcement in this sector may be explained by: increasing competition in the sector; the progressive strengthening of sectoral regulation and of regulators; the increasing importance of national competitions authorities; and by the different uses the Commission has made of its antitrust powers.

The first phase described above, characterised by high antitrust activism, can be explained by the concentration of the market which had just been formally liberalised, by the weakness of sectoral regulation at that time, and by the Commission's determination to support the liberalisation programme (which it had initiated and pushed forward against the will of many Member States). As noted by Ungerer,[89] a key senior Commission official at that time: 'The [excessive price actions] aimed particularly at passing on rapidly the advantages of liberalisation in terms of price reductions and service developments to consumers – a major objective in order to show as rapidly as possible the effective consumer benefits and to secure sustained public support for liberalisation.' The second phase, with cases highlighting the inadequacy of national regulatory decisions, may be explained by the use that the Commission made of its antitrust power either to correct the decisions of national regulatory authorities which were new and which, in some Member States, were captured by the incumbents; or to impose on national authorities its vision of a common regulatory approach. The third phase, with fewer cases, may be explained by increasing competition in the market due to the strengthening of the regulation and the technological progress, by the increasing activity of the NCAs in the telecommunications sector, and by new powers the Commission gained, under sector regulation, to control the NRAs' decisions.[90]

Thus, the analysis of the enforcement cycle and the reasons for its evolution shows that the Commission uses its antitrust powers not only to ensure that competition is not distorted on the market but also to support the liberalisation programme and to control, and if necessary correct, the decisions of NRAs. Those additional uses of antitrust power are not without danger. First of all, they lead to duplication of procedures and to the risk of conflicting decisions, and they encourage forum shopping between regulators and the Commission. Second, the political mandate and the not-fully-open procedures followed by DG Competition when dealing with a case are not well suited for such a pro-active role in the market.[91] Third, it upsets the EU institutional balance, as the

[89] Herbert Ungerer, 'Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector' (2001).

[90] Since 2003, in addition to the standard *ex post* infringement procedure, the Commission has had an additional specific tool to control the NRAs decisions and, in case of violation of competition law, veto part of those decisions. See Articles 7 and 7a of the Framework Directive (Directive 2002/21), as amended by Directive 2009/140.

[91] Pierre Larouche, *Competition Law and Regulation in European Telecommunications*, Hart Publishing, 2000, at 353–358; Damien Geradin and J. Gregory Sidak, 'European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications',

Commission is sometimes behaving as a European telecoms regulator, even though the establishment of such an authority has thus far been rejected by the EU legislator.

Therefore, I submit that the antitrust intervention of the Commission should be decided case-by-case on the basis of two questions: first, what are the objectives to be achieved (legal certainty, simplicity, internal market, consistency of antitrust law); and second, what are the best means to achieve them (Commission *ex ante* review of NRA draft decisions on the basis of Articles 7 and 7a of the Framework Directive, infringement procedure on the basis of Article 258 TFEU, or an antitrust case on the basis of Article 102). In case of inappropriate intervention by an NRA, I suggest that the Commission should signal the infringement of EU law during its review of the draft decision, and veto it when it can. If the veto is not possible (in particular because the presumed infringement relates to a remedy) and the decision is nevertheless adopted, the Commission should intervene in the most efficient way, possibly taking parallel actions against the regulated operator and against the Member State concerned.[92] In those circumstances, the two actions would be at the expense of legal certainty, as all actors would be informed of the serious doubts of the Commission when reading its appraisal of the NRA's draft decision. Another way forward would be to enable the Commission to appeal the regulatory decision before an appropriate national court.

5. Conclusion

In the telecoms sector, the Commission has been very active opening cases under Article 102, especially at the beginning of the period of liberalisation. Such activism has been fully supported by the EU Courts which, in deciding on the main contentious legal issues, has extended significant power to the Commission to control unilateral conduct in the sector.

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in Martin Cave, Sumit Majumdar and Ingo Vogelsang, eds., *Handbook of Telecommunications Economics v II*, North-Holland, 2005, pp 518 et seq.

[92] Some authors argue that, when multiple legal actions are possible, the Commission should prioritise the infringement action over the antitrust action in order to avoid holding the incumbent responsible for the mistakes of its regulator, to ensure more legal certainty, and to avoid multiple complaints. See Nicolas Petit, 'The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion', in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulatory Authorities in the EC: A New Paradigm for European Governance* (Edward Elgar, 2005) pp 194 et seq; Damien Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court's Judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?', 41 *Common Market Law Review* 1552 (2004); John Temple Lang, 'European Competition Policy and Regulation: Differences, Overlaps, and Constraints', in François Leveque and Howard Shelanski (eds), *Antitrust and Regulation in the EU and U.S.: Legal and Economic Perspectives* (Edward Elgar, 2008).

As this chapter has explained, the EU Courts see competition law as a complement, and not a substitute, to sector-specific regulation. They allow competition authorities in Europe to condemn practices of dominant operators even where they have been approved by regulators, provided the operators have retained some autonomy within their regulatory constraints. A second point made in this chapter is that the EU Courts have adopted a relatively loose legal test to condemn instances of margin squeeze, ie the main abusive practice in telecoms markets. The competition authority (or plaintiff) thus only has to prove that: (i) the margin between wholesale and retail price is negative or insufficient to cover the retail costs of the defendant, or in specific circumstances, insufficient to cover the costs of the defendant's rivals; and (ii) the compressed margin produces actual or potential anticompetitive effects. There is no requirement that the wholesale price must be excessive, or that the retail price be predatory or that the wholesale service be essential. The third point is that the EU Courts allow the Commission wide freedom of action o decide how to deal with the behaviour of a dominant regulated operator, which may be explained partly by the potential for inappropriate action by the national regulator and partly by the potential for abusive exercise of the autonomy left to the operator. In such a case, the Commission has the option to bring an action against the relevant Member State for failure to comply with its obligations under EU law, and/or to bring an antitrust action against the dominant operator. If it opens an antitrust case, the Commission may, but is not obliged to, cooperate with the NRA during the investigation.

The antitrust activism of the Commission in this sector, with the blessing of the Courts, was welcomed at the beginning of the liberalisation process when the sector was still very concentrated and when the NRAs were in their infancy and sometimes captured. However, this activism, which is in dramatic contrast to the application of antitrust law in the telecoms sector in the U.S., is not without its dangers. First, it increases the risk of type I errors, which may be particularly costly in fast-moving industries. Second, it may lead to the development of a sector-specific competition law; or worse, it may contaminate the way competition law is applied more generally across the economy with sectoral reasoning. Third, it tends to multiply legal proceedings at the national and EU levels, thereby increasing transaction costs and undermining legal certainty.

It is thus understandable that the Commission today concentrates on consolidating the expertise and the independence of NRAs, and on using under sectoral regulation its *ex ante* review power on the NRAs' draft decisions to signal violations of the competition law. It is only when some abusive practices remain that the Commission should consider, with due caution, to open an antitrust case. In other words, the Commission has a special responsibility not to abuse the important antitrust power granted to it by the EU Courts.